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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ——

[redacted]TIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FLEETWOOD TRAILER CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this case on September 8, 1966.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 13–24) is reported at 366 F. 2d 126. The findings of fact, conclusions of law, and order of the National Labor Relations Board (App. B, *infra*, pp. 26–37) are reported at 153 NLRB 425.

JURISDICTION

The decree of the court of appeals was entered on September 8, 1966 (App. A, *infra*, p. 25). By order dated December 8, 1966, Mr. Justice Douglas extended

the time for filing a petition for a writ of certiorari to and including Sunday, February 5, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

On the day a strike ended, the employer announced that, because of a reduction in production caused by the strike, no jobs were available. Two months later, the employer, which at all times intended to resume full production as quickly as possible, hired six new workers, even though there were strikers who had continually made known their desires to return to work. The question presented is whether the employer violated Section 8(a) (1) and (3) of the National Labor Relations Act by thus preferring new workers over the returning striking employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix C. *infra*, pp. 38–39.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On August 5, 1964,[1] the Company, a manufacturer of mobile homes, had about 110 employees and was scheduling production at the rate of 20 units per week (App. B, *infra*, p. 30; Tr. 75, 98–99, 101, 103–104, 108, 122, Res. Exh. 2).[2] On the following day, as a

[1] All dates hereinafter are in 1964.

[2] "Tr." refers to the stenographic transcript of the unfair labor practice hearing, "G.C. Exh." refers to the NLRB General Counsel's exhibits, and "Res. Exh." refers to the re-

result of a breakdown in collective bargaining negotiations between the Company and the Union,[3] about half of the employees struck in support of their contract demands (App. B, *infra*, p. 29; Tr. 100, 122). Because of the strike, the Company cut back its production schedule to ten units per week and reduced orders for materials accordingly (App. B, *infra*, p. 30; Tr. 73, 76, 101–102, Res. Exh. 2).

By August 18, the Company had hired about 20 new employees and some strikers had returned to work, so that its work force had increased to 71 (App. B, *infra*, p. 29; Tr. 76, 102, 122, G.C. Exh. 11). On that date, the Union ended the strike, accepted the Company's last contract offer, and requested reinstatement of the remaining strikers (App. B, *infra*, p. 29; Tr. 63–66). Although the Company intended to return to its prestrike production level as quickly as possible,[4] it explained to the Union that the cutback resulting from the strike prevented it from resuming full production and hence full employment immediately, and thus that it, at that time, was not hiring (App. B, *infra*, pp. 29, 30; Tr. 65–66, 72–73, 95, 102, 110–111). The Company refused to put the employees who had remained on strike on a preferential hiring list as requested by the Union. It offered to

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spondent Company's exhibits. These documents, together with "Volume 1, Pleadings," comprised the record in the court of appeals, and certified copies thereof have been filed with the petition.

[3] San Bernardino-Riverside Counties (California) District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO.

[4] This goal was obtained by about December 13 (App. B, *infra*, p. 30; Tr. 104, Res. Exh. 2).

consider them for openings on a non-discriminatory basis if they made applications for employment and kept them current, but emphasized that the Company would be free to hire from any source (App. B, *infra,* p. 29; Tr. 66, 71, 94–95).

On August 20, six strikers applied for reemployment (App. B, *infra,* p. 29; G.C. Exh. 2–9). None of the employees hired during the strike were specific replacements for these particular strikers (App. B, *infra,* p. 31; G.C. Exh. 11, Tr. 123–124). Between October 8 and 16, the Company hired six employees, who had not previously worked for it, for jobs which the striker-applicants were qualified to fill; none of these jobs was first offered to the striker-applicants (App. B, *infra,* pp. 29, 30–34; Tr. 5–6, 80–84, 105–108, 111). The six striker-applicants were reemployed between November 2 and December 14 (App. B, *infra,* p. 30).

B. THE BOARD'S DECISION AND ORDER

The Board, adopting the examiner's decision, found that, when the six strikers applied for reemployment at the end of the strike in August, they had not been permanently replaced, since no one had been hired to fill their particular jobs. The Board further found that the lack of immediate openings at that time "was a temporary condition which the * * * [Company] knew would change and intended to change" by "return[ing] to full production and to a full crew as soon as practicable." (App. B, *infra,* p. 31.) The Board concluded that, in these circumstances, the strikers were entitled to reinstatement as work became available, in preference to new applicants for employment;

and that the Company, by treating them as though their employment status had terminated, had interfered with and discriminated against them because of their strike activity, in violation of Section 8(a) (1) and (3) of the Act (App. B, *infra*, pp. 34, 35). The Board ordered the Company to cease and desist from the unfair labor practices found and to reimburse the strikers for any loss of earnings attributable to the Company's failure to reinstate them at the time of the October hirings (App. B, *infra*, pp. 26–27, 35–36).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals, one judge dissenting, refused to enforce the Board's order. Holding that the right of an economic striker to reinstatement in his job must be determined on the basis of conditions which exist on the very day that he first offers to return to work, the court concluded that, since the jobs of the striker-applicants were unavailable on August 20, when they had applied for reemployment, the Company was not obliged to accord them a preference over new employees when jobs later became available (App. A, *infra*, pp. 17–19, 19–20.)

Judge Ely, dissenting, would have enforced the Board's order. In his view, since the Company admittedly intended to return to its pre-strike level of production and work force as soon as possible, the jobs of the striker-applicants could not properly be treated as having been "abolished," so as to terminate the reinstatement rights of the strikers (App. A, *infra*, pp. 21–22). The holding of the court, he concluded, unduly enlarged the risks imposed on em-

ployees who strike in support of their economic demands, and "can have no other effect than to intimidate" them in the exercise of this "precious right" (App. A, *infra*, p. 24).

REASONS FOR GRANTING THE WRIT

Like *National Labor Relations Board* v. *Great Dane Trailers, Inc.*, No. 781, this Term (certiorari granted January 9, 1967), this case involves the right of employees to strike in support of contract demands without fear of being discriminated against because of their concerted activity.[5] As in *Great Dane*, the decision of the court of appeals here cannot be reconciled with the "repeated solicitude" Congress has shown for the right to strike and the "generous interpretation" that right is to be accorded. *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 233, 235. Thus, although the employees affected in this particular case were eventually rehired by the Company,[6] we seek certiorari because the de-

[5] The question presented in *Great Dane* is whether the employer's conduct—the awarding of accrued vacation pay to some and denial of it to others following a strike—may properly be held to violate Section 8(a)(1) and (3), absent specific evidence of the employer's subjective intent to discriminate against the strikers. (We urge that it may.) Here, the Board found specifically that the employer had no "conscious purpose to discriminate against the strikers * * *" (App. B, *infra*, p. 33). The issues in the two cases are therefore presented in similar factual contexts.

[6] Although the strikers were eventually rehired, their interest is not inconsequential. Not only were they awarded back pay, but also the Board's order would protect them from being discharged, in the event of a general lay-off, prior to those new workers the Company had hired in preference to them. See note 9, *infra*.

cision below—that the employment status of an economic striker is terminated if, on the day he seeks to return to work, the employer is not hiring because of a temporary cutback in production caused by the strike—would, if allowed to stand, create additional and unwarranted risks upon the right to strike.

1. Sections 7 and 13 of the Act guarantee employees the right to strike, and Section 2(3) further safeguards the assertion of that right by preserving to strikers their status as employees under the Act. Accordingly, an employer who refuses to reinstate economic strikers upon termination of a strike necessarily impinges upon his employees' free exercise of "concerted activities for the purpose of collective bargaining * * *" (Section 7). Not every such impingement on Section 7 rights, however, constitutes an unfair labor practice under Section 8(a) (1) and (3); an employer's legitimate business interests may, in some limited circumstances, outweigh the interests of his employees. See *National Labor Relations Board* v. *Erie Resistor Corp., supra,* 373 U.S. at 228–229, 333.

Thus, in the interest of maintaining operations notwithstanding a strike, an employer may hire permanent replacements during a strike; he is not obliged to create positions thereafter for economic strikers by discharging those replacements when the strike has ended. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 345–346.[7]

[7] We do not discuss the right to reinstatement in the context of an unfair labor practice—as opposed to economic—strike. It may be noted generally, however, that if a strike was caused

Similarly, he need not create new positions for strikers whose jobs were permanently abolished, during the period of a strike, for independent business reasons. *Atlas Storage Division,* 112 NLRB 1175, 1179–1180, enforced *sub nom. Chauffeurs Local 200* v. *National Labor Relations Board,* 233 F. 2d 233, 238 (C.A. 7); *Arthur H. Sumner,* 109 NLRB 234. In contrast, should replacement be of a temporary or makeshift nature, economic strikers are entitled to reinstatement. *Firth Carpet Co.* v. *National Labor Relations Board,* 129 F. 2d 633, 636 (C.A. 2); *National Labor Relations Board* v. *Marydale Products Co.,* 311 F. 2d 890, 891–892 (C.A. 5), certiorari denied, 375 U.S. 817.

The court below, in treating temporary job unavailability as the equivalent of job abolition, departed from these settled principles. It reasoned that whether or not a striker's former job had been eliminated is "to be determined on the date on which the striker makes his offer to return to work" (Appendix A, *infra,* p. 17; also, pp. 17–18).[8] Upon that narrow and technical basis, the court went on to conclude that, since no jobs were available when the strikers first sought to return to work on August 20, they were

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by an employer's unfair labor practices, the employer must reinstate strikers, despite any replacements he may have hired (see *e.g., National Labor Relations Board* v. *Remington Rand, Inc.,* 130 F. 2d 919, 927–928 (C.A. 2)), and, on the other hand, that strikers who engage in serious misconduct may, in some circumstances, lose their reinstatement rights.

[8] The court purported to rely upon a Board decision for the quoted proposition. That decision (*Brown and Root, Inc.,* 132 NLRB 486, 493), is clearly inapposite, as the Board and the dissenting judge held. See text, *infra,* pp. 10–11.

properly denied reinstatement between October 8 and 16, when the Company hired, in preference to them, six new employees—notwithstanding that levels of production and work force had been curtailed only because of the strike, that at all times the company intended to resume those levels as quickly as possible, and that the strikers had indicated their continuing desire to return to work by reporting periodically.[9]

But, the object of any strike is to exert pressure upon the employer by lessening his ability to carry on operations. If a strike is at all successful, it is likely that the normal complement of jobs and the production level will be curtailed somewhat when the strike is terminated and the strikers seek to return to work. Hence, if such temporary job unavailability is sufficient to deprive strikers of the right to subsequent reinstatement, the right to strike itself would be significantly weakened, since such possible loss of reinstatement rights inevitably would deter many employees from striking (see *infra*, p. 11). Cf. *National Labor Relations Board* v. *Burnup & Sims, Inc.*, 379 U.S. 21, 23–24. Indeed, the risk incurred by the strikers would increase, anomalously, in proportion to the effectiveness of their concerted action, *i.e.*, the more effective the strike in curtailing the employer's opera-

[9] The Company contended below that the Union had agreed to a non-preferential hiring list. The court of appeals did not reach the issue (App. A, *infra*, pp. 19, 24 n. 2). The Board found that the Union "had bowed to the [Company] decision" to adopt a non-preferential hiring plan (App. B, infra, p. 29 n. 3), *i.e.*, that, under the circumstances, this accession could not in any way be viewed as an effective waiver of the employees' rights to reinstatement (see, *e.g. Electrical Workers Local 613* v. *National Labor Relations Board*, 328 F. 2d 723, 726–727 (C.A. 3)).

tions, the fewer the jobs available to the striking employees who seek to return to work.

2. There is no overriding employer interest which would justify the impingement upon the right to strike sanctioned by the court below. Certainly the rationale underlying the employer's right to replace workers during a strike—the need for personnel "to carry on the business" (*Mackay, supra,* 304 U.S. at 345)—cannot be utilized to support the hiring of others in preference to strikers after the strike has ended. Thus, should the employer's production be temporarily diminished, he need not reemploy strikers on the precise date they first seek to return to work. But there is no valid reason why that temporary reduction should transform the protected status of an economic striker to that of a non-employee, with consequent loss of seniority and other accrued rights.[10]

3. The court below relied upon several decisions of the Board to support its holding (App. A, *infra,* pp. 17–18; 19–20). However, as the dissenting judge pointed out (*id.* at pp. 23–24), those decisions are inapposite. Thus, in *Atlas Storage, supra,* 112 NLRB at 1179–1180, the Board had found that the striker's job had been eliminated for economic reasons, the employer having lost business (independent of the strike).

[10] We note, at this point, the Board's statement that "all [six] of the affected individuals have been rehired and there is no claim that they were not fully reinstated." (Appendix B, *infra,* pp. 34–35). That statement was made in discussing the remedy necessary to cure the violations found, and the Board was not suggesting that the rehiring of the employees gave them the full measure of security they had enjoyed before the strike. Presumably, if the decision below stands, the Company would be free to discharge the six in an economic layoff prior to the new employees it had earlier hired.

And in *Brown and Root, Inc., supra,* 132 NLRB at 493–494, the Board found that the striker had been permanently replaced. Moreover, in both of those cases the issue was whether the employer need seek out strikers when vacancies arose after the strikers' applications for reinstatement were received. Here, however, not only had the strikers made known that they were continually available and had periodically reapplied, but also it cannot be said that the jobs for which the Company hired six new workers in October were vacancies later arising. Rather, as the Board found, the strikers' jobs here were merely temporarily unavailable; production was down solely because of the strike, and it was certain that there would be openings because the Company intended to increase production to its pre-strike level as quickly as possible. See *Philanz Oldsmobile, Inc.,* 137 NLRB 867, 871.

4. By engrafting an unwarranted limitation on the rights of economic strikers, the court below has imposed a new risk on employees in an important area of the labor laws. As we have shown above, it has heretofore been held that an economic striker subjects himself only to the risk of permanent replacement or permanent job abolition. If the decision below is allowed to stand, employees may well fear that, if they engage in an economic strike, they must also expose themselves to the further risk of losing their employment status if the strike results in a temporary cutback in production. The decision below is likely to deter employees from exercising their most substantial economic weapon. Review is therefore warranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

THURGOOD MARSHALL,
Solicitor General.

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FEBRUARY 1967.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 20,511

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FLEETWOOD TRAILER CO., INC., RESPONDENT

(September 8, 1966)

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before POPE, BARNES and ELY, *Circuit Judges.*

BARNES, *Circuit Judge*: This is a petition for the enforcement of an order of the National Labor Relations Board. It had jurisdiction of the unfair labor practice complaint alleged in this case pursuant to 29 U.S.C. § 160(a)(b). This court has jurisdiction of this petition pursuant to 29 U.S.C. § 160(e).

Respondent is engaged in the manufacture of house trailers at Riverside, California. Respondent's employees are represented by the San Bernardino-Riverside Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO. At the beginning of August 1964, respondent employed approximately one hundred and ten persons and was producing twenty mobile homes per week.

In late 1964 respondent was engaged in negotiations for a collective bargaining agreement with the union.

On August 6, 1964, a number of respondent's production workers went on strike in support of their contract demands. Approximately one-half of respondent's employees either did not go on strike, or crossed the picket lines to return to work within a few days. Respondent immediately began to hire replacements for those who did strike and by August 18, 1964 had hired twenty-one new employees.

On August 18, 1964, the union agreed to end the strike and to accept respondent's last contract offer. The parties agreed that the strikers would not be put on a preferential hiring list but would be considered on a nondiscriminatory basis if they applied for employment. At the conclusion of the strike respondent did not return to its full pre-strike production force but determined to continue production with the crew of seventy-one which it had at the end of the strike. The six employees or former employees who are the complaining parties in these proceedings applied for employment on August 20, 1964. Between October 8 and October 16, 1964, respondent hired six new employees and passed over the strikers in doing so. The strikers were not rehired until December 1964.

On September 10, 1964 (before any hiring or any "passing over"), the complaining former employees filed a complaint with the NLRB. An amended complaint was filed in November 1964. Hearings were had before Trial Examiner Wallace E. Royster on February 17, 1965, and on April 16, 1965 the trial examiner filed his decision. In it he found that respondent had committed an unfair labor practice by treating its former employees as applicants for new employment without any employee status, in violation of section 8(a) (1) and (3) of the National Labor Relations Act. On June 24, 1965, a three mem-

ber panel of the NLRB (Fanning, Brown, Jenkins) adopted the decision and recommendations of the trial examiner. This petition by the NLRB for enforcement of its order followed.

We first note that it is undisputed that there was in this case no conscious intent on the part of the employer to discriminate. The trial examiner so found, and the Board affirmed. With this in mind, we turn to specific facts.

The main issue at dispute in these proceedings is whether or not the complaining strikers had been replaced or their jobs absorbed while they were on strike. If their jobs had not been filled or eliminated due to a decrease in production, the strikers were entitled to be treated as employees and to be given preference over other job applicants.

Section 8(a) (1) and (3) of the NLRA which respondent is alleged to have violated in hiring new applicants before rehiring the six complaining strikers provides:

> § 8. Unfair Labor Practices.
>
> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *.

The leading case interpreting this section held that the employer has a duty to reinstate those strikers who had not been permanently replaced, but need not re-

move replacements to reinstate the strikers. *N.L.R.B.* v. *Mackay Co.*, 304 U.S. 333 (1938).

The disagreement in the present proceedings centers on whether the jobs of the six complaining strikers had been filled so as to remove the requirement on respondent to rehire them on a preferential basis. Respondent contends that it cut back its labor force and production plans during and following the strike, and that as a result, the jobs of the strikers were either abolished or absorbed by other employees; and that such abolition or absorption amounts to replacement. Petitioner, on the other hand, contends that respondent intended to return to pre-strike production levels as soon as possible and that an employee who has been laid off retains his status as an employee and his right to preferential rehiring as long as he has a reasonable expectation of recall within the foreseeable future.

Respondent's contention that the abolition or absorption of a job is equivalent to replacement is a correct statement of the law. *Atlas Storage Division*, 112 NLRB 1175 (1955), enforced sub nom. *Chauffeurs, Team, & H., etc.* v. *N.L.R.B.*, 233 F. 2d 233 (7th Cir. 1956). It remains to be seen whether respondent's factual view of the case, or that of petitioner, is supportable. But before passing to an examination of that question, we first desire to deal with petitioner's legal contention that an employee who has been laid off retains his status as an employee and his right to preferential rehiring as long as he has a reasonable expectation of recall to work within the foreseeable future. In support of this position petitioner cites *Servel, Inc.*, 65 NLRB 1067 (1946); *Hubbard & Co.*, 45 NLRB 1 (1942); *Drayer-Hanson Incorporated*, 86 NLRB 111 (1949); *Glenn I. Martin Co.*, 74 NLRB 546 (1947); *General Motors Corp.*, 113

NLRB 876 (1955); *Lima Hamilton Corp.*, 87 NLRB 455 (1949). All of these cases deal with the question of whether employees who had been laid off, but who (it was contended) would probably be recalled in the foreseeable future, *should be permitted to vote in a representation election.* To our knowledge the National Labor Relations Board has never applied this "reasonable expectation of recall within the foreseeable future" as a test to determine whether or not a striker has been replaced. And we are not inclined to do so. Many of these cases make it clear that the policy is based on the theory that employees who are quite certain to be recalled should be given a voice in selecting the bargaining agent who will represent them. Such an element does not here exist. An examination of the facts of the individual case seems preferable where the question is one of whether an employer has committed an unfair labor practice.

Turning to the factual merits of respondent's contention that the jobs of the complaining strikers had been absorbed or abolished as a result of reduced production following the strike, we are met at the outset with the existence of a Board decision laying down the rule that the question of whether or not a striker has been replaced is to be determined on the date on which the striker makes his offer to return to work. *Brown and Root, Inc., etc.*, 132 NLRB 486, 493 (1961). The trial examiner referred to this case and held that it was not controlling, without discussing why it was not controlling. (CT 13.) We cannot agree with the trial examiner. We find it difficult to approve the Board's cavalier use of precedent when it desires to follow it, and the disregard of it when it wishes to achieve a different result. On the basis of the Board's own policy as stated in *Brown and Root, supra,* we hold that whether or not a vacancy

exists must be determined at the time the strikers apply for work after the strike.

Tested by this standard the record in these proceedings is devoid of any evidence to establish that the jobs of the six complaining strikers were still available on August 20, 1964, when they applied for reinstatement. The respondent had made a decision during the strike to curtail production. The work force at the end of the strike numbered seventy-one employees, and despite the testimony of the administrative vice-president of respondent that the longest it would take to secure any supplies would be thirty days (RT 73), respondent did not hire any additional employees until October 8, 1964, at a point when its labor force had fallen to sixty-eight employees—three less than at the end of the strike on August 18.

Petitioner's only support for its argument that the jobs had not been filled, abolished, or absorbed with responses by officers of respondent to questions of the representative of the General Counsel to the effect that respondent intended "at sometime in the future" to increase production to twenty units per week:

> Q. But it was your intention to go back to twenty a week at some future time?
> A. Yes. (RT 72.)
> Q. And you did intend at all times to get production as quick as possible up to 20 trailers a week?
> A. Correct. (RT 111.)

But such an intent directed to the future is not determinative of the question of whether or not the jobs had been abolished, tested as of the date when the strikers applied for work, two days after the strike ended. Whatever its intent, respondent did not increase its work force until two months after the strike ended, and did not attain the pre-strike level of pro-

duction until five months after the strike.[1] In light of these circumstances we do not find that the General Counsel has established that the jobs of complainants had not been absorbed or that they were still available. Rather, we believe that the record demonstrates that the jobs had been abolished or absorbed for an indefinite time and only later were they recreated.

Having found that the General Counsel is unable to support the decision of the Board with substantial evidence on the record taken as a whole, we find it unnecessary to consider the effect of the nonpreferential rehiring agreement entered into between the respondent and the union. Whether that agreement excused respondent from rehiring the strikers even if their jobs had not been absorbed, as contended by respondent, or was insufficient to waive the employees' rights guaranteed them by the NLRA, or whether such rights could not be waived, as contended by petitioner, is not before us, and we express no opinion thereon.

Enforcement of the order is denied.

POPE, *Circuit Judge,* concurring: I concur. I think it helpful to note just what the Board decided in *Brown and Root, Inc., etc.,* 132 NLRB 486, 493 (1961). It there held that the employer has no obligation to seek out or to prefer economic strikers for vacancies which opened up after their applications.

[1] In *Atlas Storage Division,* 112 NLRB 1175 (1955), enforced sub nom. *Chauffeurs, Team. & H., etc.* v. *N.L.R.B.,* 233 F. 2d 233 (7th Cir. 1956), the Board and court found that a striker's job had been absorbed and he was thus not entitled to preferential reinstatement when a job opening occurred only three days after he had made application for reinstatement. In *N.L.R.B.* v. *Roure-Dupont Mfg.,* 199 F. 2d 631 (2d Cir. 1952), the court found the strikers' jobs had been absorbed when vacancies occurred one month after the strike ended. Obviously, here there was a longer period of time.

The Board in that case cited *Atlas Storage Division*, 112 NLRB 1175, enforced, 233 F. 2d 233, 237–238 (7th Cir.) which held that a company has no duty to seek out an economic striker when no vacancy existed at the time of his request to return to work, but rather opened up later. The Board in the later case went on to say that the employer's duty was merely to refrain from discriminating against the striker should he request employment again.

Plainly the holdings in those cases precisely fit the question raised here. When these complaining employees applied for reemployment on August 20th, 1964, there was no vacancy. Some of them reapplied later, but there is no proof that any vacancies existed at those times either. Under the rule of the above cases, the employer owed no duty to seek out or prefer these strikers for the positions that opened between October 8th and October 16th, 1964.

The examiner wholly disregarded these earlier rulings, saying "The Board has held that employees who have not been permanently replaced before the end of a strike must be reinstated to their former positions as work becomes available and before new employees are hired." That was an incorrect statement.

I do not question the right or power of the Board to change its rules from time to time. But when the employer here hired these six new employees, it did exactly what the Board had held it had the right to do. To change its declared policy, and make the change apply retroactively to the respondent's acts which were entirely proper when performed was arbitrary, capricious and an abuse of discretion—the sort of thing the Administrative Procedure Act, Title 5, § 1009(e), directs us to set aside. In *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F. 2d 141, 149 (9th Cir.), we said

> We think it apparent that the practical operation of the Board's change of policy, when incorporated in the order now before us, is to work hardship upon respondent altogether out of proportion to the public ends to be accomplished. The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the act, and who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing our system of law abhors.

ELY, *Circuit Judge,* Dissenting: I do not agree with the result reached in the majority opinion, and I cannot accept the reasoning which produces it.

When a workman chooses to join his fellows in an economic strike he takes certain risks. Among these is the risk that he may be unable to regain his position after the strike if another workman has permanently replaced him. *E.g., NLRB* v. *Mackay Radio & Tel. Co.,* 304 U.S. 333, 345–46, 82 L. Ed. 1381, 58 Sup. Ct. 904 (1938). There were no permanent replacements in the jobs in question here, but it is said that the striking employees lost their preferential status because their jobs were "abolished" or their work was "absorbed" by other employees. This I cannot see. Before the strike, there were about one-hundred-ten employees. When the strike ended the number had decreased to seventy-one. It is undisputed that the employer always held the intent to resume full production as quickly as possible following the termination of the strike and, with the same haste, to return to the full complement of its prestrike labor force.

When the strike was terminated, the six employees here involved, almost immediately, made applications for reinstatement into their positions. The majority holds that these applications were ineffective

because the employer did not yet, at the very time the applications were received, have the jobs available. In the light of the employer's expressed intention to fill the positions "as quickly as possible", this holding cannot, I submit, be justified. I would hold that reinstatement applications of economic strikers should continue in operative effect until the time when the normal course of resumed production creates the necessity to accomplish the intended reopening of jobs which have remained unabolished and not permanently absorbed and in which there have not been permanent replacements.

No other persons had replaced the striking workmen in the jobs which they had held before the strike and which they resought after the economic differences had been adjusted. Their jobs had not been "abolished", for "abolish" means "to do away with wholly" or "to destroy completely". The fact that the challenged hirings were made within about six weeks after the strike had terminated should conclusively establish that the work of at least three jobs[1] had not been permanently "absorbed" by others. If a striking workman should not be denied his preferential rights unless there has been a permanent replacement, then he should not be denied those rights unless there has been complete abolition of his job or permanent absorption of his work by others. There was no such permanence here.

The Board has made factual determinations, which, if supported by substantial evidence, we are obliged to uphold. 29 U.S.C. § 160(e); *NLRB* v. *Mrs. Fay's Pies,* 341 F. 2d 489, 492 (9th Cir. 1965). As I see the evidence, it is so substantial in its support that the Board's decision, in its principal thrust, was compelled.

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[1] See footnote 2, *infra.*

I believe that my Brothers misapply the decisions in two cases, the facts in neither of which I can see as being analogous to those before us. One, *Chauffeurs Local 200* v. *NLRB*, 233 F. 2d 233 (7th Cir. 1956), enforcing the order in *Atlas Storage Division*, 112 N.L.R.B. 1175 (1955), dealt with a job wherein the work of the economic striker who formerly occupied it had been permanently absorbed. It was held that the striker was not entitled to reinstatement in a job which the employer, for economic reasons, had abolished or the work of which had been absorbed. The court held that so long as the employer did not discriminate against the striker in rehiring, it had no obligation to seek him out. The striker sought to replace an employee who had been injured. The job was not, as were those here, one which had become available as the employer followed the course of expressed intention to rebuild its labor force and production to the prestrike level. There is no indication in the cited opinion that the employer intended to or actually did resume its prestrike labor force, and the court in no way indicated that it would approach the two situations in a similar manner.

The second case involved economic strikers who had been permanently replaced during a strike. *Brown and Root, Inc.*, 132 N.L.R.B. 486, 493 (1961). The number of the replacements exceeded the number of striking workers. These are significant facts, and they are contrary to the facts in the case at bar. When, in *Brown and Root,* the Board wrote, "In the circumstances of this case, we hold that [the employers] had no obligation to seek out or prefer the [economic] strikers for vacancies which opened up after their application. * * *", its remarks were clearly directed to the facts before it. Inasmuch as the labor force in *Brown and Root, Inc.* exceeded the prestrike

number at the time of the strikers' applications for reinstatement, it seems undeniable that the vacancies occurred because of the need to replace workmen who had already permanently replaced the striking workmen.

If I have properly distinguished the cited cases from the present case, as I believe I have, the majority's direct and rather severe criticism of the Board is unjustified.

The right to strike is a precious right. It is, too often, the workman's only weapon and his only shield against oppression. The majority opinion can have no other effect than to intimidate those who believe themselves to be economically aggrieved, especially those who, for long tenure, have earned valuable benefits which they should not be required to expose to new risks, judicially created or enlarged by an inferior tribunal. It seems to me that our court now imposes an unnecessarily restrictive impairment upon the free and lawful exercise of a laborer's will.

I would enforce the order of the Board.[2]

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[2] The majority opinion reveals that when the reinstatement applications were made, there was a labor force of seventy-one and that when the October hirings occurred the number had decreased to sixty-eight. Therefore, as to the six hirings of that time, three of the available jobs might be found to be of the same nature as those in *Brown and Root, Inc.*, *supra*, *i.e.*, jobs vacated by three permanent replacements. If this were true, then I would not, of course, enforce the order, as written, in its entirety.

If the views expressed in my dissenting opinion had been shared by one of my Brothers it would then have been necessary to face, four-square, the effect of the nonpreferential hiring agreement between the union and the employer. No present purpose could be served by an indication of my opinion on this question.

In the United States Court of Appeals
for the Ninth Circuit

No. 20,511

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FLEETWOOD TRAILER COMPANY, INC., RESPONDENT

(Filed, September 8, 1966)

DECREE

Before POPE, BARNES AND ELY, *Circuit Judges.*

This cause came on to be heard upon the petition of the National Labor Relations Board, filed November 12, 1965, to enforce an order of the National Labor Relations Board issued by it on June 24, 1965, against the Fleetwood Trailer Company, Inc., Riverside, California, its officers, agents, successors and assigns.

This Court heard argument of respective counsel on June 8, 1966, and has considered the briefs and transcript of record filed in this cause. On September 8, 1966, the Court being fully advised in the premises handed down its decision; in conformity thereto, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that the enforcement of the order of the Board be and hereby is denied.

APPENDIX B

United States of America, Before the National Labor Relations Board

FLEETWOOD TRAILER CO., INC., AND LIONEL RICHMAN

DECISION AND ORDER

On April 16, 1965, Trial Examiner Wallace E. Royster issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Order

recommended by the Trial Examiner, and orders that Fleetwood Trailer Co., Inc., Riverside, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.[1]

Dated, Washington, D.C.

[SEAL]

JOHN H. FANNING,
GERALD A. BROWN,
HOWARD JENKINS, JR.,
Members,
National Labor Relations Board.

153 NLRB No. 43.

United States of America, before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California

No. 21–CA–6160

FLEETWOOD TRAILER CO., INC., AND LIONEL RICHMAN

BRUCE H. BERRY, *Esq.*, of Los Angeles, Calif., for the General Counsel.

GIBSON, DUNN & CRUTCHER, by HUGH J. SCALLON, *Esq.*, of Beverly Hills, Calif., for the Respondent.

Before WALLACE E. ROYSTER, *Trial Examiner.*

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

This matter was tried before me in Los Angeles, California, on February 17, 1965.[1] At issue is wheth-

[1] The telephone number for Region 21, appearing at the bottom of the Appendix attached to the Trial Examiner's Decision, is amended to Read: Tel. No. 688–5229.

[1] Charge filed and served September 10, 1964. Complaint alleging violations of Section 8(a) (1) and (3) of the Act issued December 11, 1964.

er Fleetwood Trailer Co., herein the Respondent, since August 20, 1964,[2] has unlawfully discriminated against Mary Nevins, Lonny Painter, Luther Malzahn, James Fuller, David Davis and Ronald Kluth, by refusing to reemploy these individuals upon unconditional application following the termination of an economic strike.

Respondent, by its answer, asserts that these strikers had been permanently replaced prior to their applications and that no unfair labor practice was committed.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. The business of the Respondent

The Respondent is a California corporation engaged at Riverside, California, in the manufacture of mobile homes. Annually, it receives goods valued at in excess of $50,000 from points outside the State of California, and sells and distributes products valued at more than that amount directly to points outside the State of California. It is conceded, and I find, that the Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

II. The labor organization involved

San Bernardino-Riverside Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, herein the Union, is a labor organization within the meaning of Section 2(5) of the Act.

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[2] All dates hereafter mentioned are in 1964.

III. The unfair labor practices

On August 6, in support of the Union's bargaining demands, Respondent's employees began a strike which ended on August 18. During this period, some of those on strike returned to work and some new workers were hired. At the conclusion of the strike the Respondent had 71 employees on its payroll. On August 18, the Respondent and the Union met with the result that the Union agreed to terminate the strike and accept Respondent's last contract offer. Attorney Jerome Byrne, the Respondent's representative, testified that on this occasion he told the Union representatives that the plant was not in need of employees and that no strikers could be given immediate employment. Byrne said that he would not put the strikers on a preferential hiring list but assured the Union that the Respondent would not discriminate in any way against them. Byrne said, in effect, that any striker who wished to return to work should make known his desire to the Respondent and renew his application at the expiration of succeeding 30-day periods if he maintained interest in returning to work. Byrne made it clear to the Union, he testified, that the Respondent would consult the list of striker applicants whenever a vacancy developed, but that the Respondent would feel free to hire from any source.[3] On August 20, the six individual strikers named earlier in this Decision applied for reemployment. Before any of them was reemployed the Respondent hired, in the period from October 8 through October 16, six individuals who had not previously been in Respondent's employ. It is the contention of the General Counsel that the six striker applicants should have been returned to work in these vacancies.

[3] The Union bowed to this decision.

Before the strike began the Respondent had a work force of sufficient size (about 108) so that it programmed the building of 20 mobile homes a week. When the strike began, the Respondent decided to cut this programming in half and cancelled or postponed deliveries of supplies and materials consistent with this decision. With the return of some of the strikers before August 18 and the employment of new workers, it was decided to attempt the production of about 15 trailers a week. At all times it was Respondent's intention to return to the full production of 20 trailers as soon as a sufficiently experienced work force was assembled and materials were at hand. This goal was reached about December 13.

Respondent contends that at the expiration of the strike, because it had then no need for additional employees, all of the strikers had been replaced, that in consequence they thereafter had no employment rights with the Respondent and were entitled to no more than a nondiscriminatory consideration of their applications for work. The position of the General Counsel is that the lack of need for additional workers on August 18 represented a temporary condition; that the striker applicants named herein had not then been replaced.

The six applicants visited the plant or telephoned the Respondent on a number of occasions on and after August 20. All were reemployed in the period from November 2 through December 14.

The position of the Respondent that all of the strikers had been replaced permanently before they offered to return to work is based upon the circumstance that on August 20 the Respondent had no immediate need for more employees. This circumstance is not challenged by the General Counsel and I find it satisfactorily to be established by the evidence. If it is true that the strikers had been per-

manently replaced, as the Respondent contends, then the six applicants named in the complaint had lost any right to reinstatement or preferential hiring. This is the status, in the view of the Respondent, that they occupied. Each was required to register his continued interest in employment with the Respondent every month and failure to do so was "disqualifying." Respondent did not however apply this rule strictly and called to the attention of a Union representative the fact that some had failed to register within the set period. When these tardy ones appeared at the plant they were permitted to regain their status as applicants. However, in my view of the case, none of the six had been permanently replaced when they offered to return to work. There is no evidence that any person was hired during the strike specifically to fill the job of any of them. The lack of job openings on August 20 was a temporary condition which the Respondent knew would change and intended to change. It was its purpose, later achieved, to return to full production and to a full crew as soon as practicable. I think it thus inaccurate to say that any of the applicants concerned here had lost his employment with the Respondent by reason of replacement.

The Board has held that employees who have not been permanently replaced before the end of a strike must be reinstated to their former positions as work becomes available and before new employees are hired. This holding is qualified only by the condition that a refusal to reinstate may be justified upon a showing by the employer that he acted upon nondiscriminatory considerations.[4] The Respondent has

[4] *Philanz Oldsmobile, Inc.*, 137 NLRB 867, 871. *Brown and Root, Inc., etc.*, 132 NLRB 486, 493–494, arises in a different factual setting. I find that holding concerning the right of reinstatement of economic strikers to jobs not open at the time of application not controlling here.

undertaken to make that showing in respect to the six applicants.

The Respondent attempts to hire what it describes as willing workers, between the ages of 19 and 25, and with satisfactory employment histories. No particular experience is required.

The first hire after the end of the strike was of Eddie Latinsky as a cabinet assembler on October 8; the second, in the same classification, of Gilbert Herrara on October 12. Neither had worked at any earlier time for the Respondent and their qualifications for hire do not appear in the record. Of the six applicants named in the complaint, Malzahn, Kluth, Nevins and Fuller had worked in cabinet assembly before the strike. There is no testimony on the part of the Respondent to indicate why none of these (other than Fuller) was reinstated to the positions for which Latinsky and Herrara were hired.

Also on October 12 Jimmy Benson was hired as a flooring employee and Everett Leffen as a sidewall employee. Plant Manager Cecil B. Chapman testified that Kluth, Nevins and Malzahn were not physically capable of handling these jobs and that for the same reason none of the three was qualified to handle the job of cabinet assembler for which Billy Valk was hired on October 16. Chapman also testified that the job of finisher, for which a new employee Dwayne Nash was hired on October 13, was unsuited to Nevins because she could not perform all of its functions; that he preferred to have a younger man than Malzahn on that job; and that he had "serious doubt" that Kluth, because of impaired eyesight could handle it. The qualifications of none of the newly hired employees is mentioned in the record.

Chapman testified that none of the striker applicants was disqualified for these job opportunities

on the basis of their prior work records with "possibly one exception," Fuller. Chapman explained that Fuller was absent on a number of occasions but, more importantly, about a week before the strike began had engaged in a "small hassle" with his supervisor. The incident was reported to Chapman who considered that it "bordered on insubordination."

I note that no unfair labor practices are alleged other than in respect to bringing the striker applicants back to work and that, save for whatever inferences may be drawn from action or lack of action in that connection, no Union animus is alleged or shown. I am not convinced that the Respondent had a conscious purpose to discriminate against the strikers but I nonetheless find that it did so.

Basically, this discrimination consists in the Respondent's position that at the conclusion of the strike all strikers had been replaced. Thereafter, instead of treating those strikers who asked for reinstatement as their status required, the Respondent saw them only as applicants for employment who were entitled to no more than nondiscriminatory consideration for job openings. But they had a different standing—they were employees. Their right to employment was not enhanced by reason of the strike but as long as they were not permanently replaced, neither was it diminished. It does not appear that the Respondent considered Latinsky and Herrara to be better qualified to work in cabinet assembly than Nevins, Melzahn, Fuller or Davis; or that Benson, Leffen, Nash and Valk were better qualified as workmen than Painter or Fuller or Davis. Nevins could not handle a job unsuited to a female, Kluth could not work where normal eyesight was a requirement and Malzahn was disqualified only to the extent that any man of his age (53) might have been. I find that the six job openings in October could have been filled by the

striker applicants and, had the Respondent considered them as employees rather than as mere applicants for hire, would have been so filled. This is so even though the Respondent had some reason for dissatisfaction with Fuller. The Respondent did not consider that he was disqualified for employment.

I find that by failing to return Lonny Painter, Luther Malzahn, David Davis, Mary Nevins, Ronald Kluth and James Fuller to employment when the October vacancies developed, the Respondent discriminated against these individuals because of participation in a lawful strike, thus discouraging membership in and activity on behalf of the Union. The Respondent has thereby engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

This conduct interfered with, restrained and coerced employees in the exrecise of rights guaranteed in Section 7 of the Act and, I find, the Respondent thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

IV. The effect of the unfair labor practices upon commerce

The actions of the Respondent described in Section III above, occurring in connection with its operations have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. All of the affected individuals have been rehired and there is no claim that they were not fully

reinstated. The Respondent shall make each whole for any loss of earnings attributable to the failure on the part of the Respondent to return them to employment in the period from October 8 through October 16. This loss shall be computed in the manner prescribed by the Board in *F. W. Woolworth Company,* 90 NLRB 289, and shall bear interest at the rate of 6 percent per annum computed quarterly.

On the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. The Respondent is an employer within the meaning of Section 2(2) of the Act, and is engaged in commerce or in an operation affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

3. By failing to return Painter, Matzahn, Davis, Nevins, Kluth and Fuller to employment in October 1964, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a) (1) and (3) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that Fleetwood Trailer Co., Inc., Riverside, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from—

(a) discouraging membership in or lawful strike activity in behalf of any labor organization

by discrimination in regard to hire or tenure of employment or any term or condition of employment.

(b) In any like or similar manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the purposes of the Act:

(a) Make Painter, Malzahn, Davis, Nevins, Kluth and Fuller whole for any loss of earnings in the manner set forth in the portion of this Decision entitled "The remedy."

(b) Post at its plant in Riverside, California, copies of the notice attached hereto as an Appendix.[5] Copies of said notice to be furnished by the Regional Director for the Twenty-first Region shall, after being duly signed by an authorized representative of the Respondent, be posted by it for a period of 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

[5] In the event these recommendations be adopted by the Board, the words "A Decision and Order" shall be substituted for the words, "The Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's order be enforced by a decree of the United States Court of Appeals, the words, "A Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words, "A Decision and Order."

(c) Notify the Regional Director for the Twenty-first Region, in writing, within 20 days from the date of receipt of this Recommended Order what steps have been taken in compliance.[6]

Dated:

WALLACE E. ROYSTER,
Trial Examiner.

[6] If these recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Twenty-first Region, in writing, within 10 days from the date of this Order what steps Respondent has taken to comply herewith."

APPENDIX C

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

SEC. 2. * * *

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain

from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *

* * * * *

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

U.S. GOVERNMENT PRINTING OFFICE: 1967